the danger of acting on the uncorroborated evidence of an accomplice but "having directed my mind to it, I have no hesitation in believing the evidence adduced on behalf of the prosecution" and he accordingly convicted the accused.

There is one more point which I wish to deal, namely the contents of the file PEP (T) 236/63. I myself have read through them; so had the learned president. The contents would not have affected the learned president's verdict even if the said file was officially produced and admitted as an exhibit at the trial.

There is ample evidence on the record to support the conviction. In my opinion no miscarriage of justice had occurred in this case. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Jag-Jit Singh & Co.*

WONG POH OI v. GERTRUDE GUOK & ANOR.

[O.C.J. (Buttrose J.) April 6, 1966]

[Singapore — Suit No. 670 of 1964]

Contract — Building contract — Extras — Failure to pay for — Whether evidence of repudiation of contract.

The defendants had agreed to build a house for the plaintiff. The plaintiff caused certain extra items to be done which she claimed were necessary to conform to the original plan. The defendants claimed the work were extras and demanded payment of them. On failure of such payment the defendants purported to repudiate the contract and sold the property to another person. The plaintiff claimed damages.

Held: (1) the delay or refusal of the plaintiff to pay for the extras cannot be regarded as showing an intention no longer to be bound by the contract and the defendants were not justified in repudiating the whole contract;

(2) the extra works became necessary to make the building conform to the original plan and therefore the plaintiff was not liable to pay for them and the defendants were not justified in repudiating the contract when the plaintiff refused to pay for them;

(3) the defendants therefore were in breach of contract and liable for damages to the plaintiff.

Cases referred to:—

(1) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1882), 9 Q.B.D. 648.

(2) *Cornwall* v. *Henson* [1900] 2 Ch. 298 at p. 303.

(3) *Freeth* v. *Burr* L.R. 9 C.P. 213.

CIVIL SUIT.

David Tar See for the plaintiff.

L. A. J. Smith for the defendants.

Cur. Adv. Vult.

Buttrose J.: This action arose out of the repudiation by the defendants of their agreement to build a house for the plaintiff. The facts were that the firm of Phoenix Building Enterprise, of which the two defendants were partners, was the developer of a housing estate at Holland Heights. Their *modus operandi* was to sell the land and the building to prospective purchasers by two agreements — one for the sale of the land and the other for the sale of the building. In the present case the plaintiff agreed to purchase the land under the sale of land agreement for $6,000 and the building under the building agreement for $31,900.

It was provided in the sale of land agreement that in the event of the purchaser seeking to mortgage or charge the land for the purpose of financing the purchase thereof and the erection of the dwelling house Phoenix Building Enterprise as vendors would at the request of the purchaser and upon the purchaser executing a form of mortgage or charge for the purpose aforesaid, execute on the date of such mortgage or charge, an assignment of the right, title and interest to the said land and premises in favour of the purchaser.

The plaintiff paid the $6,000 for the land and also made certain progress payments in accordance with the progress of the building operations as set out in the schedule to the building agreement amounting to $9,900. The sum together with the $6,000 paid for the land represented a total of $15,900 actually paid by the plaintiff leaving a balance of $22,000 to be raised on mortgage. Reference is made to this amount to be raised on mortgage in clause 3(a) of the sale of land agreement.

In addition there were certain extras ordered by the plaintiff under a works order dated the 15th October, 1962, amounting to $4,913. These extras were not in dispute and were admitted by the plaintiff. What was in dispute was the time of payment for them.

The other matter in dispute arose in connection with a further 9 items of extras which the defendants maintained were extras ordered by the plaintiff without their consent and consequently in breach of clause 7 of the building agreement. These 9 items of extras were carried out at a cost of $1,460. The plaintiff contended that these 9 items were not extras ordered by her but in fact work indispensably necessary to conform with the original terms of the contract and the plans and specifications. In other words, the plaintiff said that the defendants had deviated from the original plan and made substantial changes in the position, siting and elevations of the building from that originally agreed upon without her knowledge and consent and consequently she was entitled to have the house restored to a state or condition as similar as possible to the one she had contracted to buy and which the defendants had contracted to build for her. As such the plaintiff maintained these 9 extras were sanctioned by the defendants as being indispensably necessary and involved her in no

liability to pay for them.

One is tempted to inquire as to why it was that resort was not had to the speedy and simple process of a vendor and purchaser summons to dispose of these matters. This, however, was not done and protracted correspondence ensued, as contained in the agreed bundle of correspondence, to which I do not propose to refer.

Matters dragged on and it was not until early in 1964 on the arrival of Mr. L. A. J. Smith on the scene as the solicitor for the defendants in place of Messrs. Guok & Co. that any hard or firm line was taken and it was on the 10th March, 1964, that the defendants abruptly and without notice repudiated the agreement and promptly resold the property on the 25th March, 1964 for the same price of $37,900. The purchaser also paid, in addition, the sum of $4,913 for the extras supplied under the works order to which I have already referred.

I think it desirable to set out the defendants' letter of repudiation in full.

" 10th March, 1964

Messrs. R. C. H. Lim & Co.,
Singapore.

Dear Sirs,

re: *Lot 9 Holland Heights Estate*

I am acting for Phoenix Building Enterprise of 23 Holland Rise, Singapore, 10, who instruct me to act in the abovementioned matter in place of Guok & Co.

I understand that you have called upon my clients to execute an assignment of their right title and interest in the land in accordance with clause 4 of the agreement between your client and Phoenix Building Enterprise.

The dwelling house is completed and the notice of completion was given accordance to the architect's certificate dated 5th May, 1963.

Outstanding in the contract price of the house are two amounts, one $4,913 admitted by your client for extras and another, the sum of $1,460 denied by your client.

The payment of these sums by your client is a condition precedent to the assignment and your client's refusal to pay these sums in whole or in part constitutes a breach of a fundamental term in the agreement.

Kindly take notice that my clients hereby repudiate the agreement and in consequence hereby return to your client the sum of $15,900 paid under it.

Yours faithfully,
Sd: L. A. J. Smith "

In their pleadings the defendants alleged that the plaintiff was in breach of her agreement with them and was not entitled to specific performance thereof and the defendants were entitled to and did repudiate it. Particulars of the breach were pleaded as follows:—

(1) Without the previous written consent of the defendants carried or caused to be carried out alterations to the building in the sum of $1,460.

(2) Refused to pay the full amount due to the defendants for the extra works.

(3) Refused to pay any amount for extra works until the final instalment was due.

At the trial, I indicated that the plaintiff was not, in my opinion, entitled to a decree for specific performance as the property had been resold by the defendants and her only remedy, if any, lay in damages for breach of contract and to this I understood Mr. See to accede.

I think, perhaps, I should mention that the defendants have returned to the plaintiff all the monies amounting to $15,900 paid by her under the contract.

The two matters therefore which arise to be determined are as to whether the plaintiff's refusal to pay these two sums of $4,913 and $1,460 was justified. Was the payment of these sums by the plaintiff a condition precedent to the assignment to her of the defendants' right, title and interest in the property and did her refusal to pay for them in whole or in part constitute a breach of a fundamental term of the agreement.

I shall deal firstly with the sum of $4,913 as to which, as I have already stated, the plaintiff admitted liability. The stand she took was that this sum was payable by her together with the final instalment only on completion of the building which stage had not been reached and she relied on clause 3 of the building agreement, the material part of which is as follows: ". . . . and the final instalment of the said sum '— i.e. of the $31,900 —' (together with cost of any extra items ordered by the owner) shall be paid not later than seven days (7) days after the contractor shall have given written notice to the owner that the said house has been completed as aforesaid."

Mr. Smith argued that the rule as to the construction of words in brackets was that they were exempted from the rest of the text and that in this case they had been inserted merely *ex abundanti cautela*. I am unable to agree. It seems to me clear on the plain wording of the clause that the cost of any extras ordered by the owner only became payable together with the final instalment and within 7 days after receiving written notice from the contractor that the house had been completed together with the usual architect's certificate.

The plaintiff was, in my view, justified in refusing to pay for these extras when demand was made upon her to do so after they were carried out. Furthermore, it was established that she did so on the advice of her solicitor and it has been held that a purchaser does not, by postponing payment under the advice of his solicitor even though the advice turns out to be

erroneous thereby indicate an intention no longer to be bound by the contract as to release the vendor from further performance of it. See *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*[1]

Payment for these extras only fell due on:—

(1) the house being completed in accordance with the building agreement and the keys being handed to the plaintiff — stage (g) in the schedule to the building agreement;

(2) the production of the architect's certificate of completion to the plaintiff; and

(3) written notice to the plaintiff of such completion.

Within 7 days of the receipt of this written notice the plaintiff must pay the final instalment together with the cost of these extras.

These are the pre-requisites necessary of fulfilment before the liability to pay arises and they had not been performed prior to the defendants' repudiation.

The plaintiff was, in my view, justified in refusing to pay this sum of $4,913 and the defendants were in breach of contract in repudiating on this ground.

I think, perhaps, I should add before leaving this part of the case, that although clause 3 of the building agreement states that as regards the date fixed for payment of the final instalment time shall be deemed to be of the essence of the contract, clause 5 thereof clearly indicates that deferred payments were contemplated and could be made on payment of 15% interest. Both clause 5 and clause 6 appear to me to show clearly that time was not intended to be of the essence of the contract.

I turn now to deal with the 9 items of extras which were carried out at a cost of $1,460. I think the probabilities of the matter support the evidence given by and on behalf of the plaintiff, which I accept, on this aspect of the case.

This extra work became necessary as the result of deviations or changes from the original plan and specifications as to which the plaintiff and her husband complained to the 1st defendant. I am satisfied that the 1st defendant agreed to have these complaints attended to and did so and it was work indispensably necessary to conform to the original plan. No liability, in my judgment, attaches to the plaintiff with regard to them. The defendants therefore were not justified in repudiating on this ground also and are again in breach of contract in so doing.

In any event, assuming for a moment that the plaintiff was wrong in refusing to pay these two sums of $4,913 and $1,460 then payment of them was not, in my opinion, a condition precedent to the assignment nor did failure to pay constitute such a breach of a fundamental term of the agreement as would justify a repudiation. It is not every breach of a stipulation by one party that entitles the other to repudiate. The law is now clear that the breach of one stipulation does not carry with it even an implication of an intention to repudiate the whole contract. See *Cornwall* v. *Henson.*[2] Mere non payment of an instalment unattended by any other act on the part of the purchaser does not put an end to the contract.

Furthermore, if these 9 items of extras were in fact extras and ordered by the plaintiff unknown to and without the sanction of the defendants they are, in my view, severable from the main contract and the defendants are not justified in repudiating the whole contract because the plaintiff has delayed or refused to pay for them.

The true question as was stated by Lord Coleridge, C.J. in *Freeth* v. *Burr*[3] is as to whether the acts and conduct of the plaintiff evinced an intention no longer to be bound by the contract. In my judgment they did not.

On the contrary, it seems to me clear from the correspondence between the parties right up to the defendants' sudden letter of repudiation of the 10th March, 1964 and even after, from the plaintiff's reply on the 18th March, 1964, that she wanted to complete and, in my view, she was in a position to do so.

While it is true that the cases of *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* and *Freeth* v. *Burr, supra,* to which I have referred, are in respect of the sale of goods the same principles, I apprehend, apply also to building contracts.

Some evidence was given at the trial purporting to show that the plaintiff was unable to obtain the mortgage from the bank for $22,000 to enable her to complete and that without it she would be financially unable to do so. This was never pleaded as a reason justifying the defendants' repudiation; the only reason pleaded was the failure to pay the two sums of money to which I have already referred. In any event, as I have said, the plaintiff was, in my opinion, in a position to complete.

In the result therefore, in my judgment, the defendants were in breach of their contract and the plaintiff is entitled to damages. The damages must be assessed in accordance with the principle normally applicable to cases of contract for the sale of land where the breach does not arise from a defect in the vendor's title, that is, by reference to the difference between the purchase price and the market value at the date of the breach of contract. The purchase price was $37,900 and

the date of the breach of contract by the defendants' repudiation was the 10th March, 1964. I have therefore to consider the evidence as to the market value of this particular property as at March, 1964.

Mr. Kiong Chai Woon, a licensed auctioneer and valuer, was called on behalf of the plaintiff while Mr. Reeve, the chief surveyor and valuer for Cheong Koon Seng & Co. Ltd., auctioneers and appraisers, was called on behalf of the defendants. While both agreed that the value of the property today was $70,000 there was a marked difference of opinion between them as to its value at the 10th March, 1964. Mr. Kiong valued it at $60,000 while Mr. Reeve valued it at $40,000. It is a curious fact that while according to Mr. Kiong the property had only appreciated in value to the extent of $10,000 between March 1964 and March 1966, Mr. Reeve put the figure at $30,000.

Prices paid for comparable property in the neighbourhood are the usual as well as the best evidence as to market value. Mr. Kiong was unable to give me any evidence of sales of comparable property in the neighbourhood but he did refer to properties in Leedon Park and Orchard Road which in my view cannot be compared with and bear no resemblance to the one in question.

Mr. Reeve, on the other hand, who has served in the offices of Government Valuer, Deputy Chief Valuer and Chief Valuer Singapore during the period March 1951 to December 1964 said he had a definite recollection of the development of Holland Heights Estate and the erection of the houses there including the one in question. His opinion was that the price as originally quoted of $37,900 would not have been unreasonable as at the 10th March, 1964.

That evidence is supported by reference to actual sales of comparable property in the neighbourhood for $37,000 as at December 1964 supplied by Mr. Guok.

Taking into account all the various factors and circumstances and having considered the evidence in detail I am forced to the conclusion that Mr. Kiong's estimate of the market value of this property and the cost per square foot at the material time are unrealistic.

I think a fair and reasonable market value for this property in March 1964 would be somewhere in the region of $40,000. The difference between this figure and the purchase price is accordingly $2,100 which the plaintiff is entitled to recover.

There must, therefore, be judgment for the plaintiff for $2,100 and costs.

Judgment for the plaintiff.

Solicitors: *R. C. H. Lim & Co.; L. A. J. Smith.*

PUBLIC PROSECUTOR v. KHONG SOH

[A.Cr.J. (MacIntyre J.) April 7, 1966]

[Ipoh — Criminal Appeal No. 14 of 1965]

Penal Code, s. 392 — Robbery — Finding of fact by trial judge — Power of Appeal Court to reverse it — Trial judge misdirecting himself on degree of proof — Proof beyond reasonable doubt.

In this case the president of the Sessions Court had acquitted the respondent as he held that the "petitioner has failed to prove beyond any shadow of doubt that the accused took part in the robbery".

Held: (1) the learned president had misdirected himself on the degree of proof required and therefore in the circumstances the appellate court was entitled to reverse the finding of the learned president, which was based on inferences from the evidence;

(2) on the facts the evidence adduced by the defence far from casting any doubt on the prosecution case had strengthened it and the accused should therefore be convicted.

Cases referred to:—

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, H.L.

(2) *Tay Khong Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, P.C.

(3) *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372.

(4) *Liew Kaling and others* v. *Public Prosecutor* [1960] M.L.J. 306, C.A.

CRIMINAL APPEAL.

James Loh (Deputy Public Prosecutor) for the appellant.

M. S. Mahendran for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal by the Public Prosecutor against the acquittal of the respondent by the learned president of the Sessions Court at Ipoh on a charge of robbery with some other persons of 2 piculs and 25 katis of tin-ore valued at $850 from one Leong Tee Loong at about 10.30 p.m. on 14th August, 1964, an offence punishable under section 392 of the Penal Code.

According to the evidence, 4 masked men broke into the kongsi house of Leong Tian Tin Mines at the time and date mentioned in the charge, herded the inmates into a room and kept guard over them while another party entered into the store room at the rear of the kongsi house and started to fill in some sacks with tin-ore which was stored there. At about this time the two night watchmen employed by the mine were some 15 chains away from the kongsi house inspecting the palong. Their attention was first drawn to the happenings in the kongsi house by the barking of dogs. They then noticed that the gasoline lamp which was kept in front of the